Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., LAW ENFORCEMENT ALLIANCE OF AMERICA, INC., JANE DOES I and II, and JOHN DOES I, III, and IV

Petitioners,

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Brady Act, P.L. 103-159, 107 Stat. 1536 (1993), established the national instant criminal background check system ("NICS") to determine whether persons may lawfully receive firearms from federally-licensed dealers. 28 C.F.R. § 25.9(b) provides that, in administering NICS, the FBI shall retain information for several months on persons who it determined may lawfully receive firearms. The issues are:

1. Whether the retention of information on such persons is unlawful under § 103(i) of the Act, which provides that no federal agency may (1) "require that any record" generated by NICS "be recorded at or transferred to a facility owned, managed, or controlled by the United States," or (2) use NICS "to establish any system for the registration of firearms, firearm owners, or firearm transactions," except of ineligible persons.

2. Whether the above retention of information is unlawful under 18 U.S.C. § 922(t)(2), which provides that, if a person may lawfully receive a firearm, NICS shall assign a unique number, provide the number to the dealer, and "destroy all records of the system with respect to the call" (other than the number and the date) and "all records of the system relating to the person or the transfer."

3. Whether deference is due to the Attorney General's interpretation of § 103(i) and § 922(t)(2) under *Chevron*'s "plain meaning" rule as refined in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 S. Ct. 1291 (2000), particularly the presumption against "cryptic delegation."

PARTIES TO PROCEEDING

All parties to the proceeding are identified in the caption. The two corporations which are petitioners here have no parent companies, have no stock, and hence have no publicly held company that owns 10% or more of the corporation's stock.

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OPINIONS BELOW

The opinion of the court of appeals, 216 F.3d 122, is printed in the Appendix ("App.") at 1a. The unreported judgment is at App. 43a. The unreported orders denying the petition for rehearing and petition for rehearing *en banc* are at App. 45a and 47a. The district court's unreported memorandum order denying the motion for preliminary injunction is at App. 49a. The district court's unreported memorandum and order granting the motion to dismiss is at App. 54a.

JURISDICTION

On July 11, 2000, the court of appeals rendered judgment affirming the district court's order dismissing the complaint. App. 43a. On October 26, 2000, the court of appeals denied the petitions for rehearing and for rehearing *en banc*. App. 45a, 47a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The texts of the following are in the Appendix: Brady Handgun Violence Prevention Act, P.L. 103-159, 107 Stat. 1536 (1993); 28 C.F.R. Part 25; 28 C.F.R. § 25.9 (as amended).

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

The complaint was filed on November 30, 1998, the effective date of § 102(b), the Permanent Provision of the Brady Act, P. L. 103-159, 107 Stat. 1536 (1993) ("the Act"). Plaintiffs alleged that 18 U.S.C. § 922(t)(2), §§ 103(h) & (i) of the Act, and § 621 of Title VI of P.L. 105-277, prohibited NICS from keeping records on persons who NICS determined may lawfully receive firearms. Plaintiffs challenged the validity of 28 CFR § 25.9(b), which allowed the FBI to keep such records for several months, and § 25.9(d), which authorized the FBI's State agents to keep such records indefinitely.[1]

The district court had jurisdiction under 28 U.S.C. § 1331. The court dismissed the complaint under F.R.Civ.P. 12(b)(6) and rendered judgment for defendant. App. 54a.

The court of appeals, in a 2 to 1 decision, affirmed. The majority found "nothing in the Brady Act that unambiguously prohibits temporary retention of information about lawful transactions" and deferred to the Attorney General. App. 2a. Dissenting, Judge Sentelle wrote that "by retaining instead of destroying [records], she [the Attorney General] and the system exceed the statutory grant of authority." App. 36a. Further, "the Attorney General is not only making such an unauthorized power grab, but is taking action expressly forbidden by Congress." *Id.* at 40a.

The court of appeals thereafter denied the petition for

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[1] Janet Reno, Attorney General, was the defendant-appellee in the courts below. John Ashcroft has been substituted for Janet Reno as the successor in office.

rehearing and petition for rehearing *en banc*.

Statement of Facts

Plaintiff National Rifle Association of America, Inc. ("NRA"), which had almost 3 million members at the time of filing, teaches firearms safety, promotes the shooting sports, and fosters the lawful use of firearms. Plaintiff Law Enforcement Alliance of America, Inc. ("LEAA") has over 65,000 members and supporters who are law enforcement professionals and citizens dedicated to making America safer. Six individual plaintiffs brought this action under "Doe" pseudonyms to protect their privacy recognized by the Act. Compl. ¶s 2-4.

NICS began operations on November 30, 1998, on which date the Doe plaintiffs and numerous NRA and LEAA members provided their identifications to federal firearms licensees (FFLs). The FFLs contacted NICS, which conducted background checks and informed the FFLs that firearms could lawfully be transferred to such persons. NICS kept records on such persons for six months and would continue keeping records on millions of NRA and LEAA members in the future who underwent NICS background checks. Compl. ¶s 23-32.

ARGUMENT

THE WRIT SHOULD BE GRANTED TO DECIDE WHETHER THE FBI MAY KEEP RECORDS ON LAWFUL FIREARM TRANSFEREES AND BECAUSE THE COURT OF APPEALS DEPARTED FROM THE RULE AGAINST "CRYPTIC DELEGATION" SET FORTH IN *FDA v. BROWN & WILLIAMSON TOBACCO*

The court of appeals decided an important question of federal law that has not been, but should be, settled by this Court, and did so in a way that conflicts with relevant decisions of this Court.

First, whether the FBI has authority to retain for several months the identities of those who, over time, constitute millions of lawful firearm owners is an important question of federal law that this Court should settle. The Brady Act was an historic compromise in which firearm purchasers submit to background checks in exchange for the assurance that, once cleared as law-abiding, the government will not compile any record of their identities. In violation of prohibitions against both retention of records on and registration of lawful firearm owners, plus a command to destroy records, the Attorney General promulgated a regulation that the FBI would keep the records for several months. The court of appeals decided that it could not understand these statutory provisions – terms like "record" being "inherently ambiguous." App. 13a. It thus held that it must accord *Chevron* deference to the agency, which is the very entity against which the privacy protections were enacted.

Treating such straightforward acts of Congress which are the product of historic compromises over a highly sensitive political issue in this manner can only serve to erode confidence in the executive and judicial branches by a large segment of the American population. "There is a long tradition of widespread lawful gun ownership by private individuals in this country," *Staples v. United States*, 511 U.S. 600, 610 (1994), and "roughly 50 percent of American homes contain at least one firearm of some sort." *Id.* at 614 n.8. This Court should settle the important question of federal law of whether the FBI may retain the identities of law-abiding firearm purchasers.

Second, the opinion conflicts with *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as refined in *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291 (2000). Under *Chevron*, if Congress has clearly spoken to the issue, the court must apply the law without any deference to the agency's interpretation. *Brown & Williamson* adds the dispositive caveat that, even in the absence of statutory clarity, the courts should not recognize an implied delegation of power to an agency where the issue is of great public magnitude. As applied to FDA regulation of tobacco, "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." 120 S.Ct. at 1315. That is even more the case here, where clear statutory provisions prohibit the claimed agency power.

This case would give the Court an opportunity further to clarify the *Brown & Williamson* branch of the *Chevron* doctrine in the context of a statutory scheme which affects the privacy rights of millions of Americans.

I. THE NATIONAL INSTANT CHECK SYSTEM

The Brady Handgun Violence Prevention Act, P.L. 103-159, 107 Stat. 1536 (1993), established NICS to determine whether persons may lawfully receive firearms from federal firearms licensees ("FFL"), i.e., firearm dealers. Section 103(b) provides:

> [T]he Attorney General shall establish a national instant criminal background check system that any licensee may contact, by telephone or by other electronic means in addition to the telephone, for *information, to be supplied immediately*, on whether receipt of a firearm

> by a prospective transferee would violate section 922 of title 18, United States Code, or State law. (Emphasis added.)

Section 102(b) created 18 U.S.C. § 922(t)(1), under which an FFL may not transfer a firearm to a non-licensee without having contacted NICS for a background check. The FFL may transfer the firearm after NICS provides a unique number, or three days pass and NICS has not notified the FFL that receipt of the firearm would be unlawful.

Section 922(t)(2) provides that, once a person passes the background check, NICS assigns a unique number, communicates the number to the FFL, and destroys all records regarding the call, the person, and the transfer (other than the number and the date). Section 103(i) of the Act prohibits NICS-generated records from being recorded at or transferred to any government facility, and prohibits any system of registration of lawful firearms owners or transactions.

NICS was created as part of the FBI by AG Order No. 2186-98, Final rule: National Instant Criminal Background Check System Regulation, 63 F.R. 58303 (Oct. 30, 1998), which promulgated 28 C.F.R. Part 25. Section 25.7 provides that an FFL must provide the following information to NICS about a proposed transferee: name, sex, race, date of birth, and State of residence. Also requested may be the Social Security number, military number, height, weight, eye and hair color, and place of birth.

NICS searches the databases and responds to the FFL with a "'proceed' response, if no disqualifying information was found," § 25.6(c)(1), i.e., the records "did not demonstrate that transfer of the firearm would violate federal or state law." § 25.2. Other responses are "delayed," if more research is necessary, and "denied," if firearm receipt would be unlawful.

Section 25.9(b) provides that NICS shall keep all information on each approved transferee for several months:

> The FBI will maintain an automated NICS Audit

> Log of all incoming and outgoing transactions that pass through the system.
>
> (1) The Audit Log will record the following information: type of transaction (inquiry or response), line number, time, date of inquiry, header, message key, ORI, and inquiry/response data (including the name and other identifying information about the prospective transferee and the NTN [NICS Transaction Number]). In cases of allowed transfers, all information in the Audit Log related to the person or the transfer, other than the NTN assigned to the transfer and the date the number was assigned, will be destroyed after not more than six months after the transfer is allowed. . . .
>
> (2) The Audit Log will be used to analyze system performance, assist users in resolving operational problems, support the appeals process, or support audits of the use of the system. . . . Information in the Audit Log pertaining to allowed transfers may only be used by the FBI for the purpose of conducting audits of the use and performance of the NICS. . . .

After this case was decided, a final rule changed the six-months retention period to ninety days and provided for the furnishing of the Audit Log to the Bureau of Alcohol, Tobacco and Firearms.[2] App. 97a. This amendment does not change the issues in this case.

"Audits" include criminal investigations, including to

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[2] Final rule, National Instant Criminal Background Check System Regulation, 66 F.R. 6470, 6474 (Jan. 22, 2001). On January 20, two days before the rule was published, President Bush issued a Regulatory Review Plan directing that "with respect to regulations that have been sent to the OFR [Office of the Federal Register] but not published in the Federal Register, withdraw them from OFR for review and approval." Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 F.R. 7702 (Jan. 24, 2001).

discover NICS use "for unauthorized purposes, such as running checks of people other than actual gun transferees"; and to "determine whether potential handgun purchasers or FFLs have stolen the identity of innocent and unsuspecting individuals or otherwise submitted false identification information, in order to thwart the name check system." 63 FR at 58303. As for the Act's privacy provisions, "the statute does not specify a period of time within which records of approvals must be destroyed."[3] *Id.*

II. § 103(i) FORBIDS (1) RECORDATION OF NICS RECORDS AT GOVERNMENT FACILITIES AND (2) FIREARM-OWNER REGISTRATION

The "audit log" squarely violates the Act's prohibitions on NICS keeping any records of the identities of lawful firearm transferees. Section 103(i) of the Act provides:

> PROHIBITION RELATING TO ESTABLISHMENT OF REGISTRATION SYSTEMS WITH RESPECT TO FIREARMS-- No department, agency, officer, or employee of the United States may--
>
> (1) require that any record or portion thereof generated by the system established under this section be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or political subdivision thereof; or

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[3] Some States have consented to perform the background check in lieu of the FBI. "POC (Point of Contact) means a state or local law enforcement agency serving as an intermediary between an FFL and the federal databases checked by the NICS." § 25.2. Section 25.9(d) exempts POCs from the destruction-requirement if the NICS-generated records "are not part of a record system created and maintained pursuant to independent state law regarding firearms transactions." However, the Act neither recognizes POCs nor exempts them from the privacy provisions.

> (2) use the system established under this section to establish any system for the registration of firearms, firearm owners, or firearm transactions, except with respect to persons, prohibited by section 922(g) or (n) of title 18, United States Code or State law, from receiving a firearm.

"When Congress enacts a statute designed to limit government intrusion in the private affairs of its citizens, the statutory provisions must be followed scrupulously." *United States v. Bacheler*, 611 F.2d 443, 447 (3d Cir. 1979), citing *United States v. Giordano*, 416 U.S. 505, 515 (1974). The above section was instrumental to the compromise in which Brady Bill supporters assured firearm owners that no Big Brother would watch them once they passed the background check. The "audit log" ruptures this commitment.[4]

A. NICS Records May Not be "Recorded at or Transferred to" a Government Facility

Under the plain meaning of § 103(i)(1), the information in the "audit log" constitutes "any record or portion thereof generated by the system established under this section," and its retention means that it has been "recorded at or transferred to" a government facility. Yet the lower court writes that it cannot understand those words (App. 13a):

> [S]ubsection (1) is not so clear. To begin with, the statute's prohibition against "record[ing]" a "record" is inherently ambiguous. What is a "record," when has it been "recorded," and what kind of "record" cannot be "recorded?" When a NICS operator enters the name of a prospective purchaser into the system, is that a

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[4] "To say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government." *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970).

"record?" Has it been "recorded?" If not, when does it become a "record" that cannot be "recorded?"[5]

This is "verbal know-nothingism that would render government by legislation quite impossible." *Deal v. United States*, 508 U.S. 129, 135 (1993). The panel created ambiguities that did not exist. Section 103(i) speaks unambiguously to "any" record. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.' *Webster's Third New International Dictionary* 97 (1976). Congress did not add any language limiting the breadth of that word . . . ." *United States v. Gonzales*, 520 U.S. 1, 5 (1997).

Any information NICS receives and reduces to written form, whether on paper or electronically, is a "record." This is consistent with 18 U.S.C. § 922(t)(2)(C), which provides that once NICS approves the transfer, NICS shall "destroy *all* records of the system with respect to the call" (other than the unique number and the date) "and *all* records of the system relating to the person or the transfer." The lower court finds that this subsection, since it provides that a NICS operator enters a name on a computer to conduct the background check, renders § 103(i) meaningless. App. 13a. Yet Congress was not required to begin § 103(i) with the phrase "except as otherwise provided," for it passed the general rule and exceptions in the same bill.[6]

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[5] By contrast, no court has ever found any ambiguity in the criminal provisions of the Gun Control Act, *e.g.*, 18 U.S.C. § 922(m), requiring that "records" be kept by licensees.

[6] "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'" *Fourco Glass Co. v. Transmirra Corp.*, 353 U.S. 222, 228-29 (1957). When two

Other exceptions to the general rule of § 103(i) include: records kept for three days following a "delayed" response, 18 U.S.C. § 922(t)(1)(B)(ii); records of denied transfers, § 922(t)(2); and retention of the unique number and date, § 922(t)(2)(C). The panel concludes: "These limitations on the obligation to destroy NICS records would have no meaning if subsection (1) barred recording of any information generated by the NICS." App. 14a. To the contrary, these exceptions are fully consistent with § 103(i)(1)'s ban on the keeping of records of *approved* transferees.[7]

The most apparent exception to the general rule of § 103(i) is for persons legally ineligible to receive firearms.[8] However, the panel asserts that the clause "except with respect to persons, prohibited [by law], from receiving a firearm," which appears at the end of § 103(i)(2), cannot be read to apply to § 103(i)(1), which therefore has no meaning. App. 14-15a. Yet both clauses are in the same sentence, and reading the "except with respect to" clause to refer to both (1) and (2) harmonizes these provisions.

The panel chooses the provision's most unlikely meaning to create further ambiguity: "Emphasizing the word 'require,' [the Attorney General] argues that the statute only prohibits the government from requiring third parties, such as

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provisions appear to conflict, a construction that renders one superfluous should be avoided. *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998).

[7] *See Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994) (statutory terms must not be treated "essentially as surplusage--as words of no consequence.").

[8] That NICS may keep records on *ineligible* persons hardly implies that § 103(i)(1) does not prohibit records on *eligible* transferees. Indeed, records in which ineligible persons have falsely certified that they have no legal disabilities may be used to prosecute them. *See* 18 U.S.C. § 922(a)(6); 27 C.F.R. § 178.124(c)(1).

firearm dealers, from recording information at a government facility. . . . [T]he plausibility of her view highlights the statute's ambiguity." App. 16a. Yet § 103(i)(1) refers to (1) "any record," which could not be broader, (2) "generated by" NICS, which includes records created by the FBI while operating NICS, and (3) "recorded at or transferred to" a federal or state facility, and only NICS (not a dealer) could "record [a record] at" a NICS facility.

It was not until the appeal that the Attorney General invented the argument that § 103(i)(1) "does not implicate the Attorney General's retention of NICS records" and only prohibits "additional reporting requirements on firearms dealers." Br. of Appellee 12-13, 27. This was "nothing more than an agency's convenient litigating position." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-13 (1988).[9]

A similar regulation was invalidated in *National Rifle Ass'n v. Brady*, 914 F.2d 475, 483-84 (4th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991), which applied *Chevron* and held:

> Congress could hardly have been more clear in its direction that "no other recordkeeping shall be required." While the information requested in the regulation may well be beneficial to BATF in its efforts to track firearm dispositions, the plain language of the statute makes clear that this is information that Congress did not wish licensees to be required to

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[9] In the district court, the Attorney General suggested that § 103(i)(1) means no more than, and is subsumed by, subparagraph (2). Dismiss Mem. 13-14. That violated the tenet that "it is our duty to give effect, if possible, to every clause and word of a statute, . . . rather than to emasculate an entire section, as the Government's interpretation requires." *United States v. Menasche*, 348 U.S. 528, 539 (1955). Further, § 103(i) uses the disjunctive "or," and "canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings . . . ." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-39 (1979).

record.

In sum, § 103(i)(1) absolutely prohibits the retention of records on approved transferees, including the "audit log."

B. The Prohibition on "*Any* System for the Registration of" Firearm Owners or Transactions

Section 103(i)(2) provides that no department of the United States may "use the system established under this section to establish *any* system for the registration of firearms, firearm owners, or firearm transactions," except regarding ineligible persons. This clearly encompasses the "audit log." Once again, "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Gonzales*, 520 U.S. at 5. "Register" means "a record or list of names . . ., often kept by an official appointed to do so," and "registration" means "(1) a registering or being registered (2) an entry in a register." *Webster's New World Dictionary* 1130 (1988).[10]

In the panel's agnostic view, the audit log is not a registration system because it "includes no addresses of persons approved to buy firearms, . . . nor even whether approved gun purchasers actually completed a transaction." *Id.* at 15. Yet a listing of identities is "registration,"[11] even sans address, and to

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[10] The courts do not "defer to the agency's choice among available dictionary definitions," *MCI Telecommunications Corp. v. AT & T Co.*, 512 U.S. 218, 226 (1994), and in any event the Attorney General never cited a single dictionary definition in support of her argument. "Most cases of verbal ambiguity in statutes involve . . . a selection between accepted alternative meanings shown as such by many dictionaries." *Id.* at 227.

[11] *See HC Gun & Knife Shows, Inc. v. City of Houston*, 201 F.3d 544, 546, 548 (5th Cir. 2000) (term "registration of firearms" includes ordinance requiring gun-show attendees to give names). The ordinary meaning of "registration" as a listing of personal identities is found in laws requiring sex offenders to register with police. *E.g., Russell v.*

conclude that the mass of persons who subject themselves to the approval process do not actually consummate the transaction assumes that they are just having a background check for the fun of it (and committing fraud) and not because they intend to receive a firearm.

The "audit log" constitutes registration as that term has been used since 1934 in the National Firearms Act, 26 U.S.C. § 5841(a), which provides regarding machineguns and other narrowly-defined "firearms" that "the Secretary shall maintain a central registry of all firearms in the United States," including, *inter alia*, the "identification and address of person entitled to possession of the firearm." The panel stated that "unlike the machine gun registry, information in the Audit Log is routinely purged after six months,"[12] and "the Audit Log therefore represents only a tiny fraction of the universe of firearm owners." App. 18a. Yet the law prohibits "*any* system of registration," without regard to duration or the percentage of owners currently registered.

The Attorney General claims to need the records to detect unlawful firearms transactions. *NRA v. Brady* rejected a similar agency argument that, without the regulation at issue, it would be difficult to detect unlawful dispositions of firearms by licensees. 914 F.2d at 484-85. The court explained:

> While the Secretary may accurately depict the enforcement problems that invalidation of this requirement may create, courts are simply not at liberty to ignore the plain language of the statute. The policy

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Gregoire, 124 F.3d 1079, 1082 (9th Cir. 1997).

[12] Actually, 26 U.S.C. § 5841(c) provides only that "each firearm transferred shall be registered to the transferee," who could transfer the firearm to another in less than the "audit log" retention period. Further, § 5802 provides that "each year, each . . . dealer in firearms shall register with the Secretary," which is an annual, not a permanent, registration.

> arguments forwarded by the Secretary with respect to enforcement "should be directed to the Congress rather than to [the courts]."

Id. at 485, quoting *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 22 (1963).

Once again, Congress expressed itself in the clearest of terms. The "audit log" constitutes registration and violates § 103(i)(2).

C. Legislative Background

The legislative history provides insights into the reasons for enactment of § 103(i). That provision was not included in H.R. 7, the Brady bill as passed in the House in 1991. However, while requiring a waiting period and the reporting of transfers to local police, it required police to destroy such reports within 30 days. House Report 102-47, 102d Cong., 1st Sess., 3 (1991). Rep. Roukema argued that the Brady bill "in no way provides for a system of national gun registration" because, when a transfer is approved, "law enforcement officers must destroy the information" in 30 days. Cong.Rec., 102d Cong., 1st Sess., H2836 (May 8, 1991).

In passing H.R. 7, the House defeated H.R. 1412, a substitute offered by Rep. Staggers. House Report 102-47 at 10. Yet the substitute contained the seeds of the Act's Permanent Provision, including the instant check and the equivalents of § 103(i) and § 922(t)(2). Cong.Rec., 102d Cong., 1st Sess., H2855-56 (May 8, 1991). Rep. Armey asked Staggers:

> Many firearm owners in my district are concerned that H.R. 1412 might authorize the Federal Government to compile a database of firearm purchase using information collected through the instantaneous computer check. Is it the gentleman's understanding that this legislation would not authorize the Federal

Government to keep these records?

Id. at H2828-29. Staggers replied, "yes, that is correct." The colloquy continued:

> Mr. Armey. In fact, does the gentleman not specifically intend that this legislation would prevent any Department . . . of the United States from compiling or recording any record obtained through the instantaneous check?
>
> Mr. Staggers. Yes; that is correct. In fact, this legislation is designed to prohibit the use of the hotline to establish any system for the registration of handguns, or handgun owners.

Id. at H2829.

Senator Hatch argued that "the Brady bill is a step towards gun registration." 135 Cong.Rec. S8253 (June 20, 1991). Senator Stevens added: "We have all heard, my generation did, about Hitler and how, in country after country, he read the gun registration laws and took the guns away from those who had them. This helped the Nazis take over Europe." *Id.* at S8266. Police and the federal government would "compile lists of handgun buyers," the goal of which was "national registration with the intent of confiscation of guns." *Id.* at S8267. Senator Craig referred to the bill as enacting "gun registration, [and] other unprecedented threats to the civil rights of American gun owners." *Id.* at S8268.

Senator Stevens offered an amendment to H.R. 7 which included the language of § 103(i). *Id.* at S8932, S9025 (June 27, 1991). Stevens explained:

> My amendment will not permit the registration of either a gun or a gun owner. In fact, the amendment *specifically prohibits keeping any records about lawful sales*. This will eliminate the possibility of an assembly of gun registration lists by local, State, or Federal authorities.

Id. at S8934 (June 27, 1991) (emphasis added).

The substitute failed, but the Dole-Metzenbaum compromise bill was introduced. *Id.* at S9075 ff. (June 28, 1991). It provided for an interim waiting period and a permanent federal instant check, including a § 103(i) provision. *Id.* at S9082, 9196. Senator Thurmond explained: "This instant check system will be used by licensed dealers to check the eligibility of purchasers of all firearms and *no records of legitimate purchasers may be kept.*" *Id.* at S9080 (emphasis added). The bill as amended passed the Senate. *Id.* at S9086. The Brady bill was then attached to the broader crime bill which was not enacted.

By the time the Brady bill was debated and passed in 1993, § 103(i) was in both House and Senate versions and, being non-controversial, was not debated. *Id.* at H9121 (Nov. 10, 1993), S16507 (Nov. 19, 1993).

The policy behind § 103(i) is far older than the Brady Act, for Congress has historically rejected registration. Handgun registration was rejected in 1934. National Firearms Act: Hearings Before the Committee on Ways and Means, U.S. House of Rep., 73rd Cong., 2d Sess., 58 (1934). The Property Requisition Act of 1941 prohibited any construction to "require the registration of any firearms possessed by any individual for his personal protection or sport" or "to impair or infringe in any manner the right of any individual to keep and bear arms."[13] P.L. 274, 55 Stat. 742 (1941).

Passage of the Gun Control Act of 1968 coincided with the defeat of all proposals to require firearm registration. 114

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[13] This was passed "in view of the fact that certain totalitarian and dictatorial nations are now engaged in the willful and wholesale destruction of personal rights and liberties." Rept. No. 1120, House Com. on Military Affairs, 77th Cong., 1st Sess., 2 (Aug. 4, 1941). Rep. Paul Kilday, the sponsor, explained: "[R]egistration of firearms is only the first step. It will be followed by other infringements of the right to keep and bear arms until finally the right is gone." 87 Cong.Rec. 7101 (1941).

Cong.Rec. 27422-56 (Sept. 18, 1968). The Firearms Owners' Protection Act of 1986 enacted a provision similar to § 103(i), *see* 18 U.S.C. § 926(a), about which Senator McClure explained: "The central compromise of the Gun Control Act of 1968--the *sine qua non* for the entry of the Federal Government into any form of firearms regulation was this: Records concerning gun ownership would be maintained by dealers, not by the Federal Government and not by State and local governments." 131 Cong.Rec. S9163-64 (July 9, 1985).

In sum, § 103(i) reflects Congress' historical rejection of the government keeping records on lawful firearms owners and transactions. The "audit log" is in clear violation of this legislative purpose.

III. RECORD DESTRUCTION REQUIREMENTS

A. § 922(t)(2) Requires Immediate Destruction

The "audit log" violates § 922(t)(2), which commands three duties to be carried out in sequence and immediately:

> If the receipt of a firearm would not violate section 922(g) or (n) or state law, the system shall–
>
> (A) assign a unique identification number to the transfer;
>
> (B) provide the licensee with the number; and
>
> (C) destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer.

"Assign," "provide," and "destroy" are present tense, transitive verbs describing *seriatim* commands to be followed

one after the other.[14] The Act includes no grace period authorizing the Attorney General to ignore, for such period as she chooses, the destruction requirement, which applies when the unique number is provided to the licensee. Section 922(t)(2) mandates "destroy all records," not "retain all records for such time as the Attorney General may prescribe by regulation."[15]

The panel conceded that "the statute clearly requires NICS identification numbers to be both assigned and provided immediately." It added, however, that record destruction "plays no role in either authorizing or rejecting firearm transfers--the action that section 103(b) requires to be taken immediately." App. 10a. This ignores the statutory structure in which "destroy" follows "assign" and "provide" as part of the same continuous process. The panel reasoned that "section 922(t)(2)(C) does not say 'destroy immediately'; it says only 'destroy.'" App. 8a. Yet "destroy" (even without "immediate") and "retain" are irreconcilable. Every act or period of retention violates the command to destroy.

Congress knew how to allow a grace period when it so intended. The Act's Interim Provision required the licensee to furnish a copy of the transferee's statement to the local chief law enforcement officer ("CLEO"). 18 U.S.C. § 922(s)(1)(A)(IV). The CLEO was commanded to search all available records (i.e., manual and computerized) and to

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[14] "It is a rule laid down by Lord Bacon, that *copulatio verborum indicat acceptationem in eodem sensu*, the coupling of words together shows that they are to be understood in the same sense. . . ." *Neal v. Clark*, 95 U.S. 704, 708-09 (1877). *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) ("a word is known by the company it keeps (the doctrine of *noscitur a sociis*)").

[15] In the district court, the Attorney General argued that "her decision concerning when to destroy records of such transfers is entirely discretionary." Mem. in Opposition to Motion for Prelim. Injunction 54.

ascertain the legality of the transaction within five days.[16] The CLEO "shall, within 20 business days after the date the transferee made the statement . . ., destroy the statement, [and] any record containing information derived from the statement . . . ."[17] § 922(s)(6)(B)(i). The Permanent Provision includes no similar grace period. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983).

The Interim Provision, an unfunded federal mandate, required local law enforcement to destroy all records (including paper) in a mere 20 days and allowed no "audit log" thereafter. Congress could not have intended to allow paid federal employees who could destroy computerized records with the push of a button to keep them for several months.

As passed, the Act contained the Senate version mandating simply "destroy," not the House version mandating "immediately destroy," which the House adopted, on motion by Rep. Gekas, without debate. 139 Cong.Rec. H9123 (Nov. 10, 1993), S16506 (Nov. 19, 1993). Senator Craig, expressing privacy concerns about the computerized instant check, explained about the Senate version: "It is a matter of law that they [the records] should not stand once the background check

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[16] 18 U.S.C. § 922(s)(2). *Printz v. United States*, 521 U.S. 98 (1997) declared that provision unconstitutional.

[17] "The Brady bill in no way provides for a system of national gun registration--quite the opposite. In every instance where a handgun sale is approved under Brady, law enforcement officers must destroy the information they've been provided within 20 days." 139 Cong.Rec. H9106 (Nov. 10, 1993) (statement of Rep. Roukema). "To help protect the privacy of legal purchasers, it [the Brady bill] requires that a copy of the statement and other records of the transaction be destroyed within 20 days." *Id.* at H9117 (statement of Rep. Hughes).

is done, so that there not be a fear that somebody were compiling a master list of guns and gunowners. That is not the intent and the law clearly understands that." *Id.* at S16328.

While the conference committee's version did not include the word "immediately," its report explained:

> The differences between the House bill, the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clerical changes.

H.R. Conference Report No. 103-412, at 13 (Nov. 22, 1993). The report listed seven of these "differences" between the House and Senate versions. *Id.* at 13-14. The destruction requirement was not among them, meaning that it was among the "clerical corrections, conforming changes . . ., and minor drafting and clerical changes."

The panel found it weighty that the final version did not say "immediate." App. 10-11a. Yet "destroy" is facially inconsistent with "do not destroy."

The panel stated of bills that did not pass that "this post-Brady Act legislative activity reflects no unambiguous congressional intent to require immediate destruction of NICS records." App. 12a. Yet members of Congress may not support new bills because they believe that existing law already encompasses the subject of those bills. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988) (rejecting "reliance on Congress' subsequent failure to enact proposed legislation"). "A bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 121 S. Ct. 675, 2001 U.S. LEXIS 640, *19 (2001) (quotation marks and citation omitted.).

In sum, § 922(t)(2) requires record destruction, which precludes record retention, regardless of its label.

B. § 103(h): Ensuring Privacy and Security

Having rendered the Act's "Thou shalt nots" lifeless, the panel upheld the regulation as an implied delegation under § 103(b) of the Act, which directed the Attorney General to establish NICS, and § 103(h), which provides that "the Attorney General shall prescribe regulations to ensure the privacy and security of the information of the system established under this section."[18] App. 19-25a. Yet the regulations authorize the *violation* of such privacy and security for several months.

Much is made of the need to audit the system for criminal investigatory purposes, such as catching licensees who run checks on persons other than firearm transferees. App. 24a. Senator Leahy was concerned "about giving every gun dealer in the country access to people's private lives" through NICS. *Id.* Yet Leahy was not a bill sponsor – he announced that "I will vote against the Brady bill," 139 Cong. Rec. S16328 (Nov. 19, 1993) – and never hinted that NICS could have "access to people's private lives" for several months. The panel fails to mention a single explanation by a member of Congress of § 103(i) or the destruction requirement.

The core interest in "privacy and security" protected by § 103(h) is that of lawful firearm transferees, as § 103(i) and the destruction requirement show. The panel sees this as only "one possible" interpretation. "[B]ecause the statute nowhere identifies precisely whose privacy interests are protected, we

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[18] *Independent Insurance Agents v. Board of Governors of Federal Reserve System*, 838 F.2d 627, 632 (2d Cir. 1988) explains:

> Courts construing statutes enacted specifically to prohibit agency action ought to be especially careful not to allow dubious arguments advanced by the agency in behalf of its proffered construction to thwart congressional intent expressed with reasonable clarity, under the guise of deferring to agency expertise on matters of minimal ambiguity.

defer to the Attorney General's interpretation . . . ." App. 24a. Thus, to protect the "privacy" interests of what must be a diminutive group about which the statute is silent, the privacy interests of every lawful firearm transferee are to be violated for several months.

Incredibly, the Attorney General saw the duties of destroying records and ensuring the privacy and security of information as "countervailing." 63 F.R. at 58304. To the contrary, only record destruction ensures the privacy and security of records of approved transferees. NICS need not destroy records on ineligible persons, who thus have no expectation that information about themselves will be kept private and secure from the government.

The Attorney General asserted in the district court that "plaintiffs have no privacy interest in the fact of their acquisition of a firearm." Dismiss Mem. 21. Yet the law recognizes similar privacy interests. *Church of Scientology of California v. United States*, 506 U.S. 9, 13 (1992), stated in regard to unlawfully-seized taxpayer records:

> Moreover, even if the Government retains only copies of the disputed materials, a taxpayer still suffers injury by the Government's continued possession of those materials, namely, the affront to the taxpayer's privacy. A person's interest in maintaining the privacy of his "papers and effects" is of sufficient importance to merit constitutional protection.

The Attorney General argued as if Congress was concerned only with protection of privacy from unscrupulous FFLs who could run checks on persons who did not intend to purchase firearms, and an "audit log" is needed to ferret out such FFLs.[19] To the contrary, Congress sought to protect

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[19] An FFL who learns from NICS that a person may receive a firearm would have no adverse information on the person. If NICS advised the FFL not to proceed, the FFL would know only that the person has a

privacy from the government. Section § 922(t)(2) commands the Attorney General to "destroy all records," but the law entrusts the FFL with keeping full information on the transferee and the firearm.[20]

In sum, § 103(h) directs the Attorney General "to ensure the privacy and security" of information in NICS. Refusing to destroy the records violates the privacy of and endangers the security of this information.

C. The Prohibition on Use of Funds

Section 621, Title VI, P.L. 105-277 (1998), the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, provides: "None of the funds appropriated pursuant to this Act or any other provision of law may be used for . . . (2) any system to implement 18 U.S.C. 922(t) that does not require and result in the destruction of any identifying information submitted by or on behalf of any person who has been determined not to be prohibited from owning a firearm."

This was enacted to negate AG Order No. 2158-98, Proposed rule: National Instant Criminal Background Check System Regulations, 63 F.R. 30430 (June 4, 1998), proposing the creation of 28 C.F.R. § 25.9(b)(1), under which NICS-generated records on approved transferees would not be destroyed until "after eighteen months." 63 F.R. at 30437.

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legal disability. That information may be available in far more detail at the local courthouse or on a criminal justice website. In any event, an FFL who misuses NICS is subject to prosecution and to revocation of access to NICS. 28 C.F.R. § 25.11.

[20] 18 U.S.C. § 923(g)(1)(A) (FFL shall maintain records of firearm dispositions); 27 C.F.R. § 178.124(c) (record includes transferee's identity and firearm description) & § 178.129(b) (record kept for 20 years).

Rep. Barr explained that "registration systems" were used "to confiscate firearms from citizens." Cong.Rec. H11652 (Oct. 20, 1998). The Act's destruction requirement "was intended to prevent the FBI or any other agency from using the system to keep a listing of everyone approved by the system to buy a firearm." *Id.* The proposed audit log "would violate the letter and spirit" of the Act.[21] *Id.*

Senator Stevens noted that NICS was intended "to protect the privacy of individual law-abiding gun owners," explaining: "One of the greatest concerns and legitimate fears of law abiding gun owners is that the federal government will create a federal gun owner registration system where law abiding gun owners exercise of their constitutional rights will be carefully monitored." *Id.* at S12742 (Oct. 21, 1998). Senator Lott stated that the FBI was prohibited from keeping NICS records on approved transfers "for any period of time." *Id.* Stevens added that § 922(t)(2) requires that record destruction "shall occur contemporaneously upon the system's approval of the firearms transfer" and the conveyance of the unique number to the dealer. *Id.* The Lott-Stevens colloquy concerned the conference committee version of § 621 that did not use the word "immediate" and that was enacted into law. *Id.* at S12742 (referring to report printed in House proceeding), H11075.

In sum, the Act commanded the Attorney General to destroy the records. When the Attorney General proposed an eighteen-month retention period, Congress precluded use of any funds for any system that did not destroy the records, once again without authorizing any grace period.

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[21] "This language is carefully crafted to ensure the FBI complies with all the provisions of the Brady Act . . . which prevent this system from turning into a gun registration scheme to restrict the second amendment rights of law-abiding Americans." *Id.*

IV. DEFERENCE IS PRECLUDED BY THE RULE AGAINST "CRYPTIC DELEGATION" SET FORTH IN *FDA v. BROWN & WILLIAMSON TOBACCO* (2000)

Like firearms, tobacco has been the subject of public controversy and hard-fought legislative compromises. *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291 (2000), aptly begins its discussion by stating:

> Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority "in a manner that is inconsistent with the administrative structure that Congress enacted into law." . . . And although agencies are generally entitled to deference in the interpretation of statutes that they administer, a reviewing "court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."

Id. at 1297, quoting *Chevron*, 467 U.S. at 842-843.

Congress directly spoke to the issue here in § 103(i) and in the record-destruction requirement. "Under *Chevron*, a reviewing court must first ask 'whether Congress has directly spoken to the precise question at issue.' . . . If Congress has done so, the inquiry is at an end . . . ." *Brown & Williamson*, 120 S.Ct. at 1300 (citation omitted). Yet the panel here saw ambiguities lurking in ordinary terms like "record" and "destroy," leaving the prohibitions containing these terms with no meaning. The existence of exceptions to the general rule prohibiting record retention led the panel to nullify the general rule. This is contrary to *Brown & Williamson*:

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning--or

> ambiguity--of certain words or phrases may only become evident when placed in context. . . . It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." . . . A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," . . . and "fit, if possible, all parts into an harmonious whole . . . ."

120 S.Ct. at 1300-01 (citations omitted).

No Brady Bill supporter expressed concern with any privacy violation other than the government's retention of records on approved transferees, and no one hinted that an "audit log" would be authorized. *See Brown & Williamson*, 120 S.Ct. at 1308 ("Given the economic and political significance of the tobacco industry at the time, it is extremely unlikely that Congress could have intended to place tobacco within the ambit of the FDCA absent any discussion of the matter."). Here, Congress enacted specific prohibitions on agency action. *Brown & Williamson* explains:

> Finally, our inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented. Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. *See Chevron*, 467 U.S. at 844. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.

120 S.Ct. at 1314. Given the always visible and sometimes rancourous debate on the question here, whether the agency may keep records on lawful transferees is hardly a detail that

Congress would have implicitly delegated to the agency.[22]

The provisions at issue are pillars of hard-won compromises, the core of which is the concession that every firearm transferee shall undergo a background check in exchange for the promise that the government shall not keep records on lawful transferees.[23] *Brown & Williamson* observes:

> Owing to its unique place in American history and society, tobacco has its own unique political history. Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products, squarely rejected proposals to give the FDA jurisdiction over tobacco, and repeatedly acted to preclude any agency from exercising significant policymaking authority in the area. Given this history and the breadth of the authority that the FDA has asserted, we are obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power.

120 S.Ct. at 1315.

As with § 103(i), the panel denied that section 922(t)(2)'s "'assign,' 'provide,' and 'destroy' directives implicitly restrict the Attorney General's authority to implement sections 103(b) and 103(h)." App. 30a. Yet *Brown & Williamson* forbids an implied delegation to retain transferee

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[22] "That theory [that a statute's ambiguity constitutes an implicit delegation] does not apply in the context of this statute taken historically and as a whole, because the context leaves no room to infer an implicit delegation, so there is no room for *Chevron* deference." *Gorbach v. Reno*, 219 F.3d 1087, 1093 (9th Cir. 2000) (en banc).

[23] *See Board of Governors, FRS v. Dimension Financial*, 474 U.S. 361, 373-74 (1986) ("the final language of the legislation may reflect hard-fought compromises. . . . The statute may be imperfect, but the Board has no power to correct flaws that it perceives in the statute it is empowered to administer.").

identities:

> Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion. To find that the FDA has the authority to regulate tobacco products, one must not only adopt an extremely strained understanding of "safety" as it is used throughout the Act -- a concept central to the FDCA's regulatory scheme -- but also ignore the plain implication of Congress' subsequent tobacco-specific legislation. It is therefore clear, based on the FDCA's overall regulatory scheme and the subsequent tobacco legislation, that Congress has directly spoken to the question at issue and precluded the FDA from regulating tobacco products.[24]

120 S.Ct. at 1315. Here, the panel's strained narrowing of "record," "destroy," and "privacy and security" led it to infer a delegation in general provisions which make no such implication. Congress would not have delegated a power of such controversial nature in so cryptic a fashion.[25]

The reality here is that the Attorney General disagreed with the policy set by Congress and sought to impose her view of the public interest. *Brown & Williamson* admonishes:

> Nonetheless, no matter how "important, conspicuous, and controversial" the issue, . . . an administrative agency's power to regulate in the public interest must

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[24] "It is highly unlikely that Congress would leave the determination of whether an industry will be . . . rate-regulated to agency discretion -- and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate filing requirements." *MCI Telecommunications Corp. v. AT & T Co.*, 512 U.S. 218, 231 (1994).

[25] "An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress." *Louisiana Pub. Serv. Comm'n. v. FCC*, 476 U.S. 355, 374-75 (1986).

> always be grounded in a valid grant of authority from Congress. And "'in our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.'"

120 S.Ct. at 1315 (citations omitted).

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

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